

Volkswagen of America, Inc. and Dennis M. Hussar.
Case 6-CA-12845

March 21, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On November 17, 1980, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and briefs in support thereof and in answer to Respondent's exceptions, and Respondent filed an answering brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² The Administrative Law Judge found that District Committeeman Hussar did not instigate or condone the strike in violation of the contractual no-strike clause which occurred on June 12, 1979, but rather engaged in consistent efforts to persuade employees not to walk out, by telling employees the strike was illegal and they would be subject to discharge. However, the Administrative Law Judge also found that the necessary and foreseeable consequence of Hussar's actions in the Interior Repair section of the plant, i.e., informing the isolated group of employees there that a walkout had occurred and that the people on the picket line were threatening employees remaining in the plant with bodily harm and damage to cars, would be to cause those employees to join the strike. Despite his further findings that Hussar did not tell any of the employees in the Interior Repair section to leave and that none of these employees did in fact walk out, the Administrative Law Judge concluded that Hussar must be held responsible for the necessary and foreseeable consequences of his actions in the Interior Repair section and that therefore Respondent was justified in discharging Hussar for encouraging these employees to strike. The Administrative Law Judge further found, however, that Respondent's later refusal to reinstate Hussar violated Sec. 8(a)(1) and (3) of the Act.

The General Counsel has excepted to the Administrative Law Judge's conclusion that Respondent was justified in discharging Hussar, and we find merit in the General Counsel's exceptions. Contrary to the Administrative Law Judge, we find that Hussar's conduct in the Interior Repair section did not necessarily and foreseeably induce or encourage the employees to join the strike. We see nothing in Hussar's actions which necessitates the conclusion that these employees could have had only one reasonable response; i.e., participating in the walkout. To the contrary, other reasonable responses were equally plausible. Hussar merely apprised the employees of the dangerous situation which was developing outside the plant. He did not urge the employees to leave or even advise them that the Union authorized the walkout. While his remarks could be construed as giving the employees the option of joining the walkout, his remarks could just as reasonably be construed as enabling the employees who remained at work to assess the situation that would face them at the end of the workday and thus possibly enabling them to avoid conflict

Judge and to adopt his recommended Order, as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Volkswagen of America, Inc., New Stanton, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Discharging employees because of their status as officials of the Union."

2. Substitute the attached notice for that of the Administrative Law Judge.

with the strikers when they left the plant. Indeed, Hussar's own conduct in staying on the job favors the latter construction, and it would appear that the employees so construed his remarks, for they did not leave their jobs. In these circumstances, we find that Respondent was not justified in discharging Hussar, since he did not encourage employees to walk out or otherwise condone the strike. Rather, we conclude that Respondent discharged Hussar solely because of his status as a union committeeman, in violation of Sec. 8(a)(1) and (3) of the Act. Respondent's mistaken belief that Hussar had actively encouraged employees to participate in the illegal walkout did not justify the discharge, where Hussar had not actually engaged in any misconduct. *General Motors Corporation*, 218 NLRB 472, 477 (1975), enf'd. 535 F.2d 1246 (3d Cir. 1976). See also *Armour-Dial, Inc.*, 245 NLRB 959 (1979), enforcement denied 638 F.2d 51 (8th Cir. 1981).

Inasmuch as we have concluded that Respondent violated Sec. 8(a)(1) and (3) of the Act by discharging Hussar, we find it unnecessary to rely on the Administrative Law Judge's conclusions regarding Respondent's refusal to reinstate Hussar.

³ The Administrative Law Judge ordered Respondent to pay Hussar backpay from October 8, 1979, the date on which Respondent refused to reinstate him; however, in light of our conclusions above, we hereby modify the remedy section of the Administrative Law Judge's Decision to provide that Respondent shall pay Hussar backpay from the date of his illegal discharge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to permit employees subject to discipline to have private consultations with a representative of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, or its Local No. 2055, immediately prior to conducting a disciplinary interview involving such employees, in accordance with past practice.

WE WILL NOT discharge employees because of their status as officials of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer Dennis M. Hussar immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings or benefits he may have suffered by reason of his discharge, plus interest.

VOLKSWAGEN OF AMERICA, INC.

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard in Pittsburgh, Pennsylvania, on May 1, 2, 8, and 9, 1980, upon a complaint issued on December 28, 1979, as amended at the hearing, based on a charge filed by Dennis M. Hussar (herein called Hussar) on October 22, 1979 (all dates herein are in 1979, unless otherwise noted). The complaint alleges that Volkswagen of America, Inc. (herein called Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), by discharging Hussar, and violated Section 8(a)(1) of the Act by refusing the request of the Union, representing the appropriate unit in which Hussar was employed, for prior consultation with Hussar and conducting a disciplinary interview with Hussar, in such circumstances, as a result of which Hussar was disciplined.

The answer to the complaint denies the commission of any of the unfair labor practices alleged, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under the Board's present standards (Respondent, engaged in Westmoreland County, Pennsylvania, in the manufacture and nonretail sale of automobiles, during a recent annual period, received directly from outside the Commonwealth of Pennsylvania, at that facility, goods and materials valued in excess of \$50,000), and to support a finding that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 2055 (herein jointly called the Union) are labor organizations within the meaning of the Act.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS AND CONCLUSIONS

I. SUMMARY OF FACTS AND ISSUES

Respondent and the Union are parties to a collective-bargaining agreement effective from October 23, 1978, through November 2, 1981, covering an appropriate unit

of "all production and maintenance employees of Respondent at its plant located in Westmoreland County, Pennsylvania, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended."

On June 12, employees in the appropriate unit engaged in a wildcat strike, in which all parties agree was in violation of the bargaining agreement. This strike was assertedly in protest of implementation by Respondent of a new method of granting relief periods to the employees, called "tag relief," notwithstanding that the bargaining agreement provided that Respondent might utilize that type of relief. In particular, the evidence indicates that the walkout was sparked by the fact that after instituting tag relief on June 11 and 12, notwithstanding employee opposition on June 11, management also, on June 12, set up another change in the employees' relief periods occasioned by scheduled overtime (all apparently within Respondent's rights under the agreement). The walkout started, about noon, in the paint department. It later spread to the whole plant under circumstances considered hereinafter.

The strike continued through Friday, June 15. On the latter date some employees crossed the picket line and went into the plant. Most seem to have left however, after about an hour, after they received their pay. Some apparently did remain in the plant and performed work that day. The plant resumed full operation on June 18, when it seems the picket line was removed, as the result of a court injunction.

Respondent has a practice, when it is considering disciplining an employee, of putting the employee "on notice." In the one instance in the record described in detail, that involving Hussar on June 12, this consisted in a member of Respondent's industrial relations department merely telling Hussar that he was "on notice."¹ Other employees who Respondent believed had been involved in the walkout were put on notice on June 18 and 19, and disciplinary interviews were conducted with these employees on June 19. Although it had been Respondent's past practice to provide an opportunity and facilities for consultation between the employee and his unit representative immediately before the disciplinary interview, on this occasion Respondent refused a request from the Union for such a consultation before Hussar's interview, and apparently also refused such preliminary consultations in the case of other employees interviewed that day. At the hearing Respondent seemed to be defending on the ground that Hussar, and possibly others, had sufficient opportunity to consult with the Union after being put on notice, but in its brief argues only that management had decided to discharge Hussar before the interview, and thus there was no need for consultation (and, perhaps, not even for union representation at the interview). This issue will, of course, be considered more closely hereinafter.

¹ The parties litigated at some length whether on this occasion the management representative made physical contact with Hussar. There is no need, in this case, to resolve that conflict. I also find it unnecessary to determine whether certain vulgarity was used during this incident.

On June 19, Respondent discharged 14 employees, including 4 union representatives (Zone Committeeman Dennis Murphy and District Committeemen Hussar, Richard Ferchak, and Samuel Rossi). According to the testimony of George Knapp, who is general administrator of industrial relations for Respondent, management discharged the union representatives, among them Hussar, who was district committeeman representing the paint department where the walkout began, for their "participation and leadership in the walkout." The General Counsel disputes Respondent's contention that Hussar participated in or exercised any leadership role in the walkout on June 12.² This was the major issue heard in this matter, and will be considered in detail below.

In addition to the four union representatives noted above, Respondent discharged two rank-and-file employees for "participation and leadership in the walkout." Other rank-and-file employees were discharged for misconduct on the picket line, or received lesser discipline.

Grievances filed by the Union on behalf of the 14 employees who were discharged were resolved on October 8 by the reinstatement of all the discharged employees, except Hussar, without backpay and with reduced discipline. No one testified as to Respondent's reasons for this action.

II. THE COURSE OF THE WALKOUT; HUSSAR'S ACTIVITIES ON JUNE 11 AND 12³

June 11

On June 11, Respondent began to institute "tag relief" in the paint department. During the course of the morning, employee Timothy M. Burkhart sent for Hussar, the union committeeman representing that department, and told him that the employees in the department were dissatisfied with tag relief, and that there would be a walkout over it. Hussar told Burkhart that this was not possible, that the contract provided that management could institute tag relief, and that "there could not be a walkout over that situation."⁴ Burkhart asked to talk to someone higher in authority in the Union, and Hussar turned him over to Dennis Murphy, union zone committeeman. Burkhart told Murphy of the problem and said he was not satisfied with Hussar's answer. However, Murphy gave him substantially the same instructions as he had received from Hussar. There was no walkout that day,

² I have noted Respondent's argument in its brief that, standing alone, "Hussar's failure to report for work on June 13, 14 and 15 justifies Mr. Hussar's discharge." (Resp. br., p. 30.) However, Knapp's testimony is that the "accurate" reasons for Hussar's discharge are the following: "[He] actively participated and directed other employees to participate in an unauthorized walkout on 6/12/79." Thus, whether or not Respondent could have discharged Hussar for his absences on June 13, 14, and 15, it is clear that Respondent did not do so.

³ At least 25 witnesses testified to what Hussar is alleged to have done and said on June 11 and 12. There are variances, inconsistencies, and conflict in the evidence. I shall not attempt to justify all of the differences. The following findings are based on my evaluation of all the evidence, including the witnesses' demeanor. Any evidence inconsistent with the findings made is not credited.

⁴ Burkhart testified that Hussar said that a walkout would be "against the contract, it's illegal to walk out," that tag relief was in the contract and had to be enforced. I do not credit the testimony of Supervisor Paul Slater that, as a result of this, Hussar told him that Hussar intended to lead a walkout over the issue.

though the incident seems to have generated a rumor of a walkout in the department.

June 12

On June 12, management told employees in the paint department that because of scheduled overtime that day there would be a further adjustment in their break periods. This upset the employees, and shortly before noon, after the lunch break, they began to leave their jobs and proceeded to the locker room to change out of their work clothes prior to exiting the plant.

The paint department, for the most part, is located on the second floor of the plant. The locker room is elevated above the second floor, reached by a flight of stairs. The cafeteria is adjacent to the locker room.

A. Locker Room Incidents

Hussar was in the cafeteria when the walkout began. He heard the commotion outside, in particular the noise of the locker doors banging. In the confusion, he heard someone call out that there was a walkout and he went into the locker room. There he told various groups of employees that they should go back to work, that the Union was working on their problem, that a walkout was illegal, and that they might well suffer for their action. The employees paid little or no attention, and some told Hussar that there was nothing he could do about it.

Supervisor Slater, who was accompanied by Paint Department Superintendent George Nancarrow, testified that he encountered Hussar in the locker room about this time and that the following conversation occurred:

I asked Dennis, I said, "Is the union authorizing this?" and Dennis said, "I can't answer that now." I asked Dennis again, I said, "What is your position in this matter?" and he said, "You know our position in this matter." And I asked Dennis again, I said, "What is your position in this matter?" and he said, "You don't expect me to say anything now."⁵

Hussar testified merely that Nancarrow asked if the employees were aware of the Union's position in the matter, to which he replied in the affirmative. Employee William Elk recalled that Hussar told Nancarrow that there was nothing he could do about the walkout. (Hussar had previously told Elk the work stoppage was illegal.)

For the purpose of this Decision, I assume that the conversation was approximately as recalled by Slater. While Hussar might have been better advised not to be so cautious in taking a position with management binding the Union, I do not consider that these statements are inconsistent with Hussar's repeated statements to the employees that the walkout was illegal, in violation of the contract, and would subject them to discipline, as a large number of employees testified.

There is a platform, or landing, at the top of the stairs leading to the locker room. About the time of the events described above, Supervisor Louis Gephart stated that

⁵ Oddly, Nancarrow testified that it was he who at that time asked almost exactly these same questions and received approximately these same responses from Hussar.

he saw several employees, including Burkhart and Hussar, on the landing "hollering and waving" to other employees. Burkhart admits that he stood on the landing and waved to a friend to leave work. Hussar denies being with Burkhart on this occasion, or standing on the platform waving at employees. Burkhart stated that he did not see Hussar on the platform during this event. Gephart, in effect, recanted his testimony on cross-examination, asserting that he could not say that he did see Hussar waving. I credit Hussar.⁶

B. Incidents on the Paint Shop Floor

After the events in the locker room, Hussar went down onto the paint department floor, where he approached groups of employees, telling them that they should stay in the plant, that the work stoppage was illegal, and that it could cost them their jobs. Hussar unsuccessfully called to get Committeeman Murphy to come and help him. While there, he was approached by George Chatlos, an industrial relations representative. In answer to a question by Chatlos, Hussar told him that there was a problem with tag relief. Chatlos told Hussar that it was his responsibility to see that the employees did not leave the plant and that he would be held "directly responsible for the situation." Chatlos testified, basically, that Hussar, after saying that there was nothing he could do, ignored Chatlos, and went on his way to other groups of employees.

About this time, Richard Trio, an administrator of industrial relations, came on the paint shop floor. He asserts that, after Hussar told him that Hussar was doing nothing about the work stoppage, he told Hussar that he had a responsibility under the contract to get the employees back on the job,⁷ and was subjecting himself and the employees to discipline. He stated that Hussar thereupon told groups of employees that they were subjecting themselves to discipline if they engaged in the work stoppage, but that Hussar did so in a "laughing and joking" manner. When asked to be more explicit about this characterization, Trio explained that he meant that Hussar had a smile on his face. Hussar denied that, instructing employees that they would be disciplined if they left the plant, he was laughing and joking. Two employees, who were asked about this on rebuttal, stated that Hussar was serious, not joking, when they heard him tell employees to stay in the plant, that a walkout was a violation of the contract and illegal.

The preponderance of the evidence shows that Hussar had been seriously and diligently attempting to get the employees not to breach the contract, and to remain at work. The evidence further shows that the employees for the most part rebuffed him in his efforts to keep them at work, as they also rebuffed management's efforts to keep them at work. To the extent that the testimony of

⁶ Gephart further testified that when this group broke up, Hussar walked down the stairs, followed by four or five employees. Gephart stated that he did not know where they went. Hussar did not leave the plant. Respondent argues that Hussar was "leading" the employees. The evidence does not support such a finding.

⁷ So far as I have been able to ascertain, no such specific commitment appears in the contract.

Chatlos and Trio indicates the contrary, I do not credit it.

C. Activities at the East Gate

As has been noted, the walkout began in the paint department shortly before noon. Within a half hour, at least 60 employees from that department had left, and for the most part had gathered at the east gate entrance to the plant. Union Zone Committeeman Murphy went out to the east gate on three separate occasions attempting to persuade the employees to cease the work stoppage and go back to work. He was unsuccessful (as were management officials who also tried to get the employees to desist their stoppage of work). In the course of these contacts with the employees at the gate, Murphy was the subject of some verbal attacks and became aware that the striking employees were threatening to throw rocks through the windows of cars of employees who had not come out on strike (the strikers intended to identify these cars by having the strikers remove their own cars from the parking lot), and to physically assault those who remained in the plant.⁸

There is ample evidence that as time went by the employees at the gate became louder and more menacing, though Respondent's witnesses tend to put this development somewhat later in the day than indicated by the General Counsel's witnesses. By the time of Murphy's third visit to the east gate, it is clear that Murphy, and other union officials with him (not including Hussar), had become concerned. Murphy suggested to the strikers that they should go home. As these union officials left the gate to go back into the plant, General Industrial Relations Administrator Knapp, who was nearby, became convinced that they were going into the plant to "pull" the rest of the employees out. (How Knapp came to this conclusion is not shown. I am led to believe that he was aware of the things that the strikers were telling Murphy.) Knapp called Industrial Relations Administrator Trio and informed him of Knapp's suspicions.

D. The Walkout on the Main Floor

The union officials came inside the plant about 1 p.m., or shortly thereafter, and proceeded to discuss the situation, and decided that, for the safety of the rest of the plant employees, those employees should be told to leave. Hussar was not present in the group that came to this decision. Immediately thereafter, Murphy and Union Committeemen Richard Ferchak and Samuel Rossi went through the various sections of the plant telling the employees to leave. This was observed by Trio. About this time, Murphy also told some firstline supervisors that they should let their people go for the employees' safety, with which suggestion the supervisors agreed. By 1:30 p.m., the employees began to stream out of the plant.

⁸ There was considerable litigation as to whether the pickets had stones or sticks in their hands. I am not aware of any direct, firsthand evidence that the pickets held sticks in their hands. There was, however, an ample supply of rocks in the area. Murphy recalled that some pickets held rocks.

About this time, or a little before, the departure of the employees caused the production lines to close down.⁹

Sometime after these events, after 2 p.m., Hussar met Murphy on the main floor of the plant, for the first time that day. At that time, according to Murphy, there were less than 50 employees left on the floor. Murphy told Hussar that a picket line was forming at the east gate, and that the pickets were threatening personal attacks, and abuse of their property, against the employees who had remained in the plant.¹⁰ Murphy said that it was so close to end of the shift, there was nothing Hussar could do about the situation, but that he should advise the employees about what was going on.¹¹

E. Hussar's Later Activity

After leaving Murphy, Hussar went to the interior repair section of the paint shop. This was an area isolated from the rest of the shop. There the employees asked him what was going on. Hussar told them that the employees downstairs had walked out, and,

I said that there was a dangerous situation outside and I couldn't give anybody an exact rundown, because . . . it was a hearsay situation from Murphy, and I could only tell the people that the people outside have a picket line, they're threatening the people in the plant remaining. There's going to be bodily harm, cars damaged. This was the way it was told to me and I relayed the message to these people.

I credit Hussar that he did not tell any employee in that section to walk out or leave the plant. Those employees in the section that day who testified agreed that they did not hear Hussar tell any employee to leave. One of these employees, who specifically asked Hussar whether he should leave, stated that Hussar told him that he (Hussar) could not tell the employee to leave.

⁹ Before Murphy, Ferchak, and Rossi had gone through the plant telling the employees to leave, Trio had specifically asked Murphy to help keep the employees in the plant because Trio believed that the plant could run effectively if the walkout were confined to the 60 employees then on the picket line.

¹⁰ Murphy testified that he told Hussar "that it was getting to be a mean situation out at the gate and that employees had threatened to beat the crap out of the employees [who remained in the plant]," and he felt that there was a danger to the employees remaining in the plant. Hussar asserted that Murphy told him that the pickets had rocks and clubs. Murphy could not recall telling him that, but stated that the pickets had rocks. Respondent's witnesses say they saw neither sticks nor rocks in the pickets' hands. However, notwithstanding the testimony of one Respondent witness that there were no rocks in the area, the evidence is that such rocks were immediately available. I find that pickets were holding rocks. It is unnecessary to determine whether they also had sticks or clubs.

¹¹ In making this finding I have fully considered Respondent's argument that this testimony—that Murphy said it was then close to quitting time—should not be credited because Nancarrow testified that quitting time that day for the majority of the employees would be 3:30 p.m., due to scheduled overtime. However, Hussar testified that quitting time on June 12 was 2:30 p.m. It is apparent that different sections of the shop had different shift end times that day. For example, Angel Brown, supervisor of the interior repair section, testified that none of her employees left before given permission to go. Reference to the time records including her section (code 3080, G.C. Exh. 8B) shows that no employee punched out after 3 p.m.

Supervisor Brown's testimony is essentially similar to the above, except, she stated that, after telling the employees that the workers on the main floor had walked out, Hussar asked "why they were still there." Hussar denied this and I credit him. Supervisors Slater and Denn and Superintendent Nancarrow thereafter came to the interior repair section, and each stated that he asked Hussar essentially the same question, and, according to Denn and Slater, got different answers. Slater asked if Hussar or the Union was authorizing the employees to leave, to which Hussar replied that the Union was authorizing the employees to go home. But Denn said that, when he asked a similar question, all Hussar would say was that Denn knew "his position on that." Nancarrow stated that he asked Hussar why he was asking the employees to leave, but did not remember the answer. He stated that it is possible that Hussar said that Nancarrow had his information wrong. On the basis of this record, I believe that it is probable that, at that time, Hussar's response to such a query would have been as Slater reported it. I do not find, on this record, that Hussar told the employees in interior repair that the Union was authorizing them to walk out.¹² In fact, as has been noted, the employees in interior repair did not walk out but remained until dismissed.

Hussar, likewise, did not leave the plant until the end of his scheduled shift.

During the afternoon, apparently after Hussar had spoken with Murphy, as previously noted, Supervisor Mavrikas (now coordinator for the paint department) testified that he and Supervisor George McMunn overheard a conversation between Hussar and employee Robert Adamson in the cafeteria.¹³ After looking at a memorandum made by McMunn and himself on June 12 to refresh his recollection, Mavrikas gave several slightly varying accounts of what he asserts Hussar said to Adamson on this occasion. The final version given on direct examination was that Hussar "said the downstairs is already walked out and if you want to walk out . . . you might as well walk out also," to which Adamson replied that he would stay and finish out his shift. On cross-examination, Mavrikas recalled that Hussar told Adamson, "if you want to stay you can, if you want to go, you can," and that he could not tell Adamson "what to do," that Hussar was just telling him "what was going on." McMunn recalled only that Hussar said that the "downstairs had walked out," which he testified Mavrikas disputed, that Adamson said he would work his 8 hours out, and that Hussar said "go ahead and stay then."

¹² No one testified that these exchanges between Hussar, Denn, Slater, and Nancarrow were overheard by employees. One employee stated that there was an argument between Hussar and Nancarrow, without stating what he may have heard.

¹³ At one point, Mavrikas said that Hussar was "telling it to a group of people," at another, he testified that "there was [sic] no other employees present in that immediate vicinity at the time." McMunn thereafter testified that "there were more [employees] there [at the same table with Adamson], but to be honest, I couldn't say who they were, because I don't know." I find that the conversation involved only Hussar and Adamson, and that there were no other employees around.

Both Adamson and Hussar testified specifically that Hussar did not tell Adamson to leave the plant on this occasion. Adamson testified that the conversation was as follows:

I asked him what the situation was at that time, he told me that there was a walkout; he advised me to stay in the plant, that I would be paid for the eight hours if I stayed. If I left, I would be subject to discipline [to which Adamson testified he responded], F— you, I'm going to stay and get my eight hours.

When asked why he used this vulgarity to Hussar on this occasion, Adamson replied that "it was just a matter of speech at the time." The record shows that this particular vulgarity is part of the common speech in the plant.

Respondent argues that Adamson would not have used this vulgar expression, "if Mr. Hussar was not actively encouraging him to join the walkout." (Resp. br., p. 25.) However, upon consideration of all the evidence, and my evaluation of these particular witnesses, I credit the testimony of Adamson set forth above.

III. THE DISCIPLINARY INTERVIEWS; REFUSAL TO PERMIT PREINTERVIEW CONSULTATIONS

A. Hussar

Respondent had a prior established practice of permitting a union representative an opportunity, upon request, to have a private consultation with the employee involved, in a room provided by Respondent, immediately before Respondent held a disciplinary interview with that employee. On June 19, when disciplinary interviews were held with employees accused of involvement in the illegal walkout, Respondent consistently refused union requests for preinterview consultations with employees subject to discipline, including Hussar. Respondent asserted to the Union that it was not required to provide such an opportunity.¹⁴ At the hearing, and in its brief, Respondent seems to rely only on arguments that it was not necessary for these employees, particularly Hussar, to have preinterview consultations because the employees subject to discipline assertedly had plenty of opportunity to talk to union representatives after they had been put on notice,¹⁵ and because Respondent assertedly had determined in advance to discharge Hussar, and presumably the others, there was no legal obligation to permit these employees to have union representation at their disciplinary interviews, much less to grant union-employee preinterview consultations. (Respondent does not refer to secs. 49 and 50 of the contract noted above.)

¹⁴ It has been noted, however, that under the heading "Disciplinary Layoffs and Discharges," sec. 49 of the bargaining contract provides for union representation at disciplinary interviews, and sec. 50 provides for private consultation between the employee and the Union "in a suitable office designated by the company, or other location by mutual agreement." While this section is not as clear as it might be as to when this consultation is to take place, it is clear that the parties had interpreted this to mean immediately before the disciplinary interview, when such consultation would make the most sense.

¹⁵ It is noted, however, that not all employees put on notice are necessarily disciplined, and, as brought out in the testimony, employees put on notice are not necessarily informed at that time of the reason for that action.

This latter contention—that the disciplinary interviews were mere formalities, with no purpose but to advise the employees that they were discharged and to give them a disciplinary action form explaining the reason for the discharge—will be examined here. The testimony given concerned only the circumstances of Hussar's interview. The two management people who conducted Hussar's interview, Chatlos and Nancarrow, testified that they had been instructed in advance that Hussar was to be discharged. However, the record as a whole leads me to the conclusion that this interview had a somewhat broader purpose, and was intended to obtain the employee's version of the charges against him before the decision to discharge him became final. Thus, it is clear that the disciplinary action slip was not prepared prior to Hussar's interview, and that Hussar and Union Representative Murphy were requested to state their side of the case, and did so.¹⁶ While Nancarrow testified "to the best of my recollection," that Hussar was discharged at the beginning of the interview, Chatlos testified that it was after Murphy's argument that Hussar should not be disciplined, "[A]t that time the [disciplinary action] slip was handed out, and that, in essence was the session." Murphy's testimony, which is credited, is that such slips were usually handed out at the end of disciplinary interviews.

Finally, confirming my conclusion that Hussar's interview, and that of the others, was for a broader purpose than merely holding a meeting to advise the employees of their discipline is Chatlos' admission in a memorandum given the Union at step one in the grievance procedure, that Chatlos informed Hussar and Murphy at the outset of Hussar's interview that "this was a formal disciplinary interview for the purpose of District Committeeman Hussar to concede or defend his actions during the unauthorized work stoppage" (Resp. Exh. 6.) (Emphasis supplied.)

B. The Other Employees

Hussar represented about 13 employees in disciplinary interviews on June 19, prior to his own interview. Chatlos and Nancarrow state that, in three or four of these interviews, Hussar defended employees on the ground that he had directed them to leave the plant on June 12 for their own health and safety. Chatlos named three such employees, while Nancarrow recalled only two of these. (Respondent concedes that nothing that Hussar may have said in these interviews affected the decision to discharge him.) Respondent called one of these employees, Darwin Kalp, as a witness, presumably in support of the contention that Hussar had engaged in such conduct. Kalp, however, testified, and I credit that he did not see Hussar on June 12, but was directed by his supervisor to leave, and later at the east gate, with other employees, was told by four union representatives (not including Hussar) to go home for their own health and safety.

¹⁶ Chatlos' contention that Murphy stated, during this discussion, that Hussar should not be disciplined because he had "done this" for the health and safety of the employees, will be considered in connection with discussion of the other employees' interviews.

Kalp also testified, under questioning by Respondent, that after leaving his disciplinary interview, he berated his supervisor loudly and in strong terms for directing him to leave and causing his discharge. Respondent then called Supervisor Edward Odorisio to contradict Kalp. Odorisio stated that, though he was in another room, he heard Kalp, on this occasion, berating Hussar loudly and in the same strong terms for telling him to leave the plant and causing his discharge. On consideration of all the circumstances, and my evaluation of the witnesses, I credit Kalp.¹⁷

Chatlos also acknowledged that his recollection that Hussar had said he directed Kalp to leave for his health and safety was inconsistent with the fact that Kalp had asserted that he had been directed to leave by this supervisor and had talked to no one else. Chatlos stated that Respondent, in the circumstances, decided that Hussar had told Kalp to leave, but not for his health and safety.

Hussar stated that in these interviews he did not say that he had directed employees to leave the plant on June 12 for their health and safety. I credit Hussar.

IV. ANALYSIS AND CONCLUSIONS

A. *The Discharge of Hussar*

Dennis Hussar, union committeeman for the paint department, and three other union representatives as well as 10 other employees were discharged on June 19, based on information Respondent obtained concerning their involvement with the walkout of Respondent's employees, on June 12, which began in the paint department, in violation of the current collective-bargaining agreement. In particular, Respondent advised Hussar and the Union that Hussar was discharged because he "actively participated and directed other employees to participate in an unauthorized walkout on 6-12-70." Respondent argues that six of those terminated (including Hussar) "were discharged because of their active encouragement of others to participate in the strike" (Resp. br., p. 37) and that all were treated consistently.¹⁸ The difficulty with this argument, however, lies in the fact that even if we were to assume that Hussar was improperly involved in the strike on June 12, Respondent thereafter, on October 8, in settlement of the union grievances, reinstated all of the discharged employees, *except Hussar*, without backpay and with reduced discipline. But the record in this case shows that Hussar's conduct was, at most, no different from that engaged in by other union representatives who were reinstated, and on this record appears much less serious than the conduct for which the others were disciplined.

It has been found that Hussar did not instigate or approve of the walkout from its inception. He engaged in consistent efforts to persuade the employees not to walk out, advising them that a walkout would be illegal and in

violation of the contract, that the employees were subjecting themselves to discharge or other discipline, and that the Union was seeking to adjust their grievances. It has been found that prior to the main plant walking out Hussar did not actively encourage employees to leave on June 12.¹⁹ Nor did Hussar leave the plant until the end of his work shift.

Sometime after 1 p.m., on June 12, a group of union representatives (not including Hussar) who believed that the strikers were likely to injure the employees who continued to work after the strike began, or damage their property, decided that the remaining employees should be instructed to leave. Zone Committeeman Dennis Murphy (superior in rank to Hussar) and District Committeemen Richard Ferchak and Samuel Rossi began going through the main floor of the plant carrying out this decision. At this point most of the plant employees began to leave.

The significance of this action can be judged by the fact that Industrial Relations Administrator Trio testified that, at this point, he had stressed with Murphy the need to keep the rest of the plant from walking out, since the plant could continue to run effectively without those who had already walked out. This request was obviously rejected by Murphy and the others. Yet Murphy, Ferchak, and Rossi, who were originally discharged, were reinstated with lightened penalties.

Sometime after Murphy and the others had advised the rest of the plant to leave, Hussar met with Murphy and learned what had been decided and what Murphy, Ferchak, and Rossi had done. Hussar went back to the paint department where he sought out a physically isolated group in the interior repair section with the intention of advising them what had occurred that afternoon. Hussar stated, and I credit, that it was not his intention to "pull" the employees out, but merely to inform them of the situation, as he felt obligated as their representative to do. His intention, however, is immaterial. The necessary and foreseeable consequences of his action—informing the employees that the picketers were threatening violence to those who remained in the plant and that most of the other employees had left—would be to cause these employees to leave, albeit in their own best interests, and for this he must be held responsible. This is not altered by the fact that none of the employees in the interior repair section did, in fact, leave until authorized by Respondent—probably due to the fact that Hussar did not affirmatively tell them to leave or tell them that the Union had authorized the walkout on the main floor.

On the basis of Hussar's activities in the interior repair section and the activities of Murphy, Ferchak, and Rossi on the main floor, Respondent was justified in originally discharging these four union representatives. However, upon the filing of union grievances on behalf of those discharged, these terminations did not become final until

¹⁷ In any event, Odorisio's testimony, which was objected to as hearsay, was not received for the truth of the contents of the statement allegedly overheard.

¹⁸ These and many other employees of Respondent stayed out of work on June 13, 14, and 15. There is no evidence that Respondent discharged any employee for this. Cf. Resp. Exh. 6, which General Administrator Knapp says contains the "basic facts" on which the decision to discharge Hussar was made.

¹⁹ Respondent contends that this case does not involve the failure of union officials to act, but that "discipline was assessed to Mr. Hussar because of his affirmative action on June 12 in precipitating, encouraging and leading the unprotected strike and for participating in the illegal strike." (Resp. br., pp. 13-14.) This contention will be further considered hereinafter.

the grievances were disposed of. Thus, as a matter of fact, Murphy, Rossi, and Ferchak were not permanently discharged. Hussar was.

As I have noted, Respondent produced no evidence as to the reason that it discriminated against Hussar in these circumstances.²⁰ It was stipulated that General Administrator of Industrial Relations George Knapp and A. J. Schell, director of personnel, were sufficiently knowledgeable and competent to testify to the reasons that "[R]espondent did not return Hussar to active employment" (Jt. Exh. 1.) Only Knapp testified and he did not explain the decision beyond his contention that Hussar participated in and directed others to participate in the walkout, which I have already considered.²¹

The obvious inference from the facts is that Respondent picked Hussar as an object lesson because he was the union representative in the section of the plant in which the walkout occurred, and Respondent wished to drive home the point that they held him responsible for preventing the walkout at its inception. Thus, Supervisor of Industrial Relations Chatlos told Hussar that it was his responsibility to see to it that the employees did not leave, and Hussar would be held "directly responsible." During Hussar's disciplinary interview, Chatlos said that Hussar did not do enough to keep the employees in the plant and that was why he was being fired. At various times, Supervisor Slater, Industrial Relations Administrator Trio, and Supervisor Odorisio indicated to Hussar that he should be doing more, or had not done enough, to prevent the walkout, though no such obligation appears in the bargaining agreement.²²

In other words, Respondent discharged and refused to reinstate Hussar because it was dissatisfied with his performance as a union representative. But this is beyond Respondent's province. So long as the union representative does not violate the contract or otherwise engage in misconduct, Respondent may not punish him because he is a union representative or for the manner in which he performs his office, for that is activity protected by the Act. If that were not so, the employees would be severely restrained in their right to representatives of their own choosing, and activities on behalf of and membership in the Union would be restricted. For the reasons set forth, and on the record as a whole, I find that Respondent, by the discharge of Dennis M. Hussar, violated Section 8(a)(3) and (1) of the Act.²³ See *General Motors Corporation*, 218 NLRB 472 (1975).

²⁰ Some rank-and-file employees, such as Burkart, who Respondent knew had encouraged others to walk out on June 12, were not discharged at all.

²¹ I have also considered the possibility that Respondent might have treated Hussar differently from the others because of alleged vulgarity used when he was put on notice. But this is nowhere asserted by Respondent, probably because Hussar may have been provoked at the time, and the widespread use of such terminology in the plant by both employees and supervisors. I have therefore rejected this.

²² Documents prepared by Respondent during the grievance process repeatedly refer not only to Hussar's actions, but also to his "passive attitude." (G.C. Exhs. 2, 3, and 7.)

²³ The General Counsel also contends that the discharge of Hussar was illegal also because it was assertedly tainted by Respondent's refusal to permit Hussar consultation with his union representative before his disciplinary interview. It is unnecessary to pass on this contention.

B. The Refusal To Permit Preinterview Consultations

It has been found that Respondent had an established practice, clearly stemming from the provisions of the bargaining agreement, of permitting the employee subject to discipline to have a private consultation with his union representative immediately preceding the employee's disciplinary interview. This was obviously a condition of employment which Respondent was not privileged to abrogate unilaterally. Indeed this was an especially important condition because it affected the right of the employees to effective representation by their designated representative. By denying the Union's requests for preinterview consultations in respect to Hussar and other employees, Respondent interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, and thus violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to permit the Union and employees subject to discipline, upon request, private consultation immediately prior to the employee's disciplinary interview, in accordance with established past practice, Respondent violated Section 8(a)(1) of the Act.
4. By discharging Dennis M. Hussar for alleged activities, or failure to act, as a union representative, during an unprotected strike beginning June 12, 1979, Respondent violated Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent violated the Act by the discharge of Dennis M. Hussar, it will be recommended that Respondent be ordered to offer Dennis M. Hussar immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and benefits, and make him whole for any loss of pay or benefits which he may have suffered as a result of his discharge by payment to him of a sum of money equal to that he would have earned as wages and other benefits from October 8, 1979, to the date of his reinstatement, less his net earnings during that period, and interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).²⁴

²⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER²⁵

The Respondent, Volkswagen of America, Inc., New Stanton, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to permit International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, or its Local Union No. 2055, upon request, an opportunity to consult with an employee subject to discipline, immediately prior to conducting a disciplinary interview with such employee, in accordance with prior practice.

(b) Discharging or refusing to reinstate union representatives for engaging in, or refraining from engaging in, union or other activities protected by the Act.

(c) In any like or related manner interfering with, coercing, or restraining employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer Dennis M. Hussar immediate and full reinstatement to his former position or, if that position no

²⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

longer exists, to a substantially equivalent position and make him whole for any loss of earnings or benefits he may have suffered by reason of his discharge, in accordance with the provisions set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its operation in Westmoreland County, Pennsylvania, copies of the attached notice marked "Appendix."²⁶ Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

²⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."